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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. TYRONE HARRIS, Defendant and Appellant.	C038917 (Super. Ct. No. 98F09577)

A jury convicted defendant Tyrone Harris of two counts of robbery (Pen. Code, § 211),[1] five counts of assault with a semiautomatic firearm (§ 245, subd. (b)), and 15 counts of false imprisonment (§ 236), along with firearm use allegations (§§ 12022.53, subd. (b), 12022.5, subd. (a)). Defendant was sentenced to 24 years in prison.

[1] All further statutory references are to the Penal Code unless otherwise indicated.

On appeal, defendant contends there was insufficient evidence to support one count of assault, the trial court erred in failing to instruct on an element of assault, and the trial court erred in refusing to take judicial notice that a coperpetrator who identified defendant before trial had entered into a negotiated plea. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

We assume all facts in favor of the judgment. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

On October 8, 1998, the Golden One Credit Union branch in Carmichael was robbed by three armed men. Defendant stood next to the customer sign-in podium near the front doors facing the interior of the bank. He held a .380 caliber semiautomatic handgun in his right had, pointing it at the people in the bank. He shouted at the people to get down on the floor.

James Carr, armed with a nine millimeter semiautomatic handgun, stood behind the teller counter. William Gilchrist, also armed with a nine millimeter semiautomatic handgun, ordered people to the floor as well. All of the bank employees and bank customers lay down on the floor.

After Gilchrist ordered the branch supervisor and a teller to remove money from the vault and teller drawers, the robbers herded the customers and employees into the vault and told them to lie down -- some on top of each other. Employee Kara Drobny came out of the employee area at the back of the bank and was ordered onto the floor. Unable to close the vault door, the robbers told the people not to watch them leave.

Several minutes later, the employees left the vault and determined that $5,000 had been stolen.

Three witnesses were at a house located behind the bank parking lot. Witness Brian McCullough saw defendant and two other men jump over the fence next door, put something into two backpacks, and run down the street. McCullough and the other two witnesses chased the three men. Defendant and Gilchrist jumped in a white Honda Prelude and were driven away. Carr got into a burgundy Honda Accord driven by Michael Johnson. McCullough got the license number of the burgundy Accord and gave it to the police. McCullough identified defendant and Gilchrist from photographs.

Sacramento Sheriff's Detective Danny Minter located the Accord through the license plate number, which was traced to Johnson. Detective Minter detained Carr and Johnson. Carr and Johnson had bank bait money, taken in the robbery. Carr confessed to the robbery. Carr told Detective Minter that "Tyrone" (whom he later identified as defendant from a photograph) and his uncle (Gilchrist) were also involved in the robbery. Carr provided "Tyrone's" telephone number.

Detective Minter looked for defendant at his grandmother's house in Sacramento. Defendant's grandmother, Nadine Gilchrist, told detectives defendant had been living at her home for several months and had been there the morning of October 8. Detectives seized ammunition and .45 caliber pistol magazines from defendant's bedroom. Defendant ultimately was arrested in Pasadena during May 2000.

Defendant testified in his own behalf, claiming he was at his mother's house in Chowchilla at the time of the robbery. Defendant claimed Michael Johnson was a rival gang member who was interested in one of defendant's girlfriends. Defendant's brother testified that he thought defendant was in Chowchilla on the date of the robbery.

James Carr testified that he did not know defendant or Gilchrist, and they were not involved in the robbery. Carr was impeached with his tape-recorded statements to Detective Minter.

In rebuttal, Detective Minter testified defendant told him he had borrowed a semiautomatic handgun from Johnson despite their differing gang affiliations.

DISCUSSION

I

Defendant contends there was insufficient substantial evidence to support his conviction of assaulting bank employee Kara Drobny with a semiautomatic firearm (count twenty). Specifically, he alleges that because Drobny was in the back of the bank when the robbery began and emerged later, there was no proof of any interaction between her and the robbers.

On appeal, "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557,

578; *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320 [61 L.Ed.2d 560].)

Defendant's argument that Kara Drobny was not personally assaulted relies solely on the testimony of bank manager Debra Black.[2] Black testified that Drobny started to come out of a back room while the robbers were herding people into the vault. Black thought Drobny then went back into the back room and shut the door. Defendant argues there was insufficient evidence that any of the robbers assaulted Drobny.

Defendant does not acknowledge the testimony of customer Angela Goedde. Goedde identified herself in surveillance photographs walking toward the vault and looking toward the gunman in the white jogging suit, identified as Gilchrist. She thought the person standing next to her at the time could be Drobny. Goedde believed Drobny came out of the back room, saw the robbers with guns, and dropped to the floor. Goedde was near Drobny on the floor, as shown in a surveillance photograph. Goedde assumed Drobny also saw the robbers with guns pointed at the people. Goedde testified she thought Gilchrist had a gun pointed at Drobny and that he was "very verbal."

Although not mentioned by either party, we also note that after proper instructions, the jury found defendant guilty of personally using a firearm in both the assault with a

[2] Defendant was also convicted of false imprisonment of Drobny but does not challenge that verdict.

semiautomatic firearm on Drobny and the false imprisonment of Drobny.

This testimony provides substantial evidence to support the verdict of assault on Drobny. Further, the testimony was clear that all three robbers had guns pointed at the people in the bank. All three robbers yelled at the people, demanding that they get on the floor. There is ample evidence the robbers intended to assault and restrain everyone in the bank and no evidence they intended to exclude anyone. Goedde's testimony demonstrated that Drobny was next to her when Goedde was assaulted by Gilchrist. The jury's own evaluation of the photographs of the robbery taken from the bank's surveillance cameras provided independent evidence of the strength of the witnesses' recollections.[3]

In addition, defendant was charged as an aider and abettor to Gilchrist and Carr, the other robbers. Under the law of aiding and abetting, a rational trier of fact was entitled to convict defendant of assault when all three robbers pointed guns at everyone in the bank. (*People v. Prettyman* (1996) 14 Cal.4th 248, 262-263.)[4] The jury was specifically instructed that count

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[3] During deliberations, the jury sent a written request to the court: "Since we need to decide each count separately, for Counts 2, 3, 5-22 who is tied to each count?" In response, the court sent the jury a list of counts and named victims, which listed "Kara Drobny" on counts 20 and 21.

[4] Neither party mentions the fact that this jury was instructed, without objection, as follows: "In order to find the defendant guilty of the crimes of assault with a semi-automatic firearm, Penal Code Section 245(b), or assault with a firearm, Penal Code

twenty, inter alia, was premised on an aiding and abetting theory. Therefore, Goedde's testimony that Gilchrist pointed a gun at Drobny and told her to get on the floor was sufficient evidence for any jury to find defendant guilty.

II

Defendant argues the trial court erred by giving a CALJIC pattern instruction defining assault that did not include the element of "actual knowledge" discussed in *People v. Williams* (2001) 26 Cal.4th 779, 784 (*Williams*). According to defendant, the failure to include this recently defined element was not harmless beyond a reasonable doubt because the jury could have found there were only "conditional assaults." We find any error to be harmless.

The jury was instructed with CALJIC No. 9.00 (1994 rev.) (5th ed. 1995 Supp.) as follows: "In order to prove an assault, each of the following elements must be proved: A person willfully committed an act which by its nature would probably

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Section 245 (a) which is the lesser offense as charged in Count Six, Ten, Fifteen and *Twenty*, you must be satisfied beyond a reasonable doubt that, one, the crime or crimes of *robbery* were committed; two, that the defendant aided and abetted those crimes; three, that a co-principal in the crime committed the crimes of assault with a semi-automatic firearm or the lesser offense of assault with a firearm; and, four, the crimes of assault with a semi-automatic firearm or assault with a firearm a lesser offense were a *natural and probable consequence of the commission of the crimes of robbery*." (Italics added.) The jury was also told it was not required to agree on the originally contemplated crime aided and abetted by defendant as long as it agreed defendant aided and abetted the target crime, and that assault with a firearm was a natural and probable consequence of that target crime.

and directly result in the application of physical force on another person and, two, at the time the act was committed, the person had the present ability to apply physical force to the person of another."

After the trial in this case, our Supreme Court issued the opinion in *Williams*. Since the decision in *Williams*, the second paragraph of CALJIC No. 9.00 has been changed to add: "2. The person committing the act *was aware of facts that would lead a reasonable person to realize that as a direct, natural and probable result of this act that physical force would be applied to another person*[.]" (Italics added.) (CALJIC No. 9.00 (2002 rev.) (6th ed. 1996).)

Defendant's argument relies upon the holding in *Williams* that assault, although a general intent crime not requiring an intent to inflict an injury on someone, nonetheless requires defendant to have committed an intentional act with "*actual knowledge* of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." (*Williams*, *supra*, 26 Cal.4th at pp. 789-790.) In *Williams*, the test requires that a defendant be subjectively aware of the *facts* giving rise to the risk of harm, but need not be subjectively aware of the risks. The high court acknowledged that this error was unlikely to affect the outcome of most assault cases because a defendant's knowledge of the relevant facts is rarely in dispute; the instructional error is generally harmless. (*Id.* at

p. 790, citing *Neder v. United States* (1999) 527 U.S. 1, 7-10 [144 L.Ed.2d 35].) Such is the case here.

Even assuming for the sake of argument that there was a possible omission or ambiguity in the instruction given *pre-Williams*, any error was harmless. Defendant was charged with assaulting employees Leslie Howton, Debra Ann Black, and Kara Drobny, and customers Steven Morris and Angela Goedde. Howton, Black, Goedde, and Morris identified defendant as one of the robbers; Black, Goedde, and Morris saw that he had a gun. Defendant told the people to get on the ground and pointed a gun at them. Defendant ordered people to get in the vault. Defendant continuously pointed a semiautomatic handgun at the people in the bank. Defendant was present when Gilchrist threw Howton on the floor. Defendant was present when Gilchrist dragged employee Courtney Hufnagle into the vault. Defendant was liable, as an aider and abettor, for Gilchrist's actions in assaulting all the victims, including Drobny. (See part I, *ante*, pp. 4-7.)

Moreover, the jury was instructed that each principal in the crime was guilty of any other crime committed by a principal that is a natural and probable consequence of the crimes originally aided and abetted. The jury was specifically instructed that, in order to find defendant guilty of the assault, it must find that robbery was committed, that defendant aided and abetted the robbery, that a coprincipal committed the crimes of assault with a semiautomatic firearm, and that assault

with a semiautomatic firearm was a natural and probable consequence of the commission of the crime of robbery.

Defendant does not claim that he did not aid and abet the robbery or that he was unaware of the existence of the assault victims (with the possible exception of Kara Drobny; see part I, *ante*, pp. 4-7). Defendant acknowledges that the evidence is that defendant himself directly pointed a gun at some victims. Defendant nevertheless contends there was a lack of evidence that "a battery would directly, naturally and probably have resulted from the conduct of one or more of the robbers, and there is therefore substantial doubt that [defendant] would have been convicted under correct instructions."

We fail to see the connection between the instruction's omission of the "knowledge" requirement and defendant's argument. *Williams* did not concern liability for aiding and abetting. Defendant's claim that any robbers did not "intend" to fire their guns is pure speculation. The jury found that pointing a loaded gun at another person while ordering that person to do an act is the use of physical force. It is not necessary, as we discussed in *People v. Raviart* (2001) 93 Cal.App.4th 258, 266, that the act actually committed be the very last act necessary before the actual battery in order to complete the assault. The jury was instructed that an assault is an act which will "probably and directly result in the application of physical force on another person." Contrary to defendant's argument, "merely" pointing a gun at someone does not require a "further" act, for example, "pulling the trigger"

to "result" in an assault. The act of pointing a loaded gun at a victim is sufficient to complete the assault. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) "The jury could reasonably infer from the fact that defendant aimed his gun and demanded compliance with his instructions that he had the requisite intent to use the gun if the victims failed to comply. [Citation.]" (*People v. Fain* (1983) 34 Cal.3d 350, 356.)

There is no evidence in this record that the guns were unloaded or that any robber did not intend to use the weapons. In fact, the presence of ammunition and handgun magazines in defendant's room was evidence supporting the opposite conclusion.

In any event, it is the knowledge element that has been inserted into CALJIC No. 9.00 post-*Williams* -- not a requirement that a defendant intends to fire the gun and is stopped by an outside force. There is little doubt that a jury instructed regarding the knowledge requirement would render the same verdicts. Even assuming the jury should have been instructed with a definition of "knowledge" in CALJIC No. 9.00, any error was harmless. (*Williams*, *supra,* 26 Cal.4th at p. 790; *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705].)

III

Defendant contends he was denied his Sixth Amendment right to confront witnesses against him because the trial court rejected his offer to prove that Michael Johnson, a coperpetrator of the robbery, had entered into a negotiated plea. Defendant makes this argument despite the fact that

Johnson did not testify at defendant's trial. We conclude that defendant's offer of proof was insufficient to establish there was any link between Johnson's statement on the day of arrest and his subsequent guilty plea. We also conclude defendant waived the issue on appeal.

Detective Minter testified that he went to defendant's grandmother's house after interviewing Michael Johnson and James Carr. During defense counsel's cross-examination of Detective Minter, defense counsel elicited the content of the statements. Minter testified that both Johnson and Carr stated defendant was involved in the robbery with them. Without defense objection, Detective Minter then testified on redirect examination that Johnson and Carr described defendant's residence, identified his picture, and gave police defendant's telephone number. Johnson was not called as a witness.

At the conclusion of the evidence, defendant asked the trial court to take judicial notice that Johnson pleaded guilty to being an accessory to the robbery and received a year in the county jail. The trial court declined to do so. The court noted that Johnson was not a witness. The court found the evidence irrelevant inasmuch as a negotiated plea was not proof of anything other than that Johnson entered a plea. Johnson's statement to the police was made on the day of the robbery, and Johnson's plea was entered some months later.

We review any decision to exclude evidence as irrelevant under the deferential abuse of discretion standard. (*People v. Green* (1980) 27 Cal.3d 1, 19.) Any error in the exclusion of

relevant evidence must be shown to result in a miscarriage of justice. We conclude the trial court did not abuse its discretion.

Defendant made no formal offer of proof but requested the court to take judicial notice of Johnson's negotiated plea. Judicial notice is a substitute for formal proof of facts. (1 Witkin, Cal. Evidence (4th ed. 2000) Judicial Notice, § 1, p. 102.) Even assuming the facts sought to be judicially noticed are a proper subject of judicial notice, judicial notice is improper if the facts sought to be noticed are not relevant. (Evid. Code, § 454, subd. (a)(2).)[5] Defendant failed to make any foundational showing that Johnson's plea and sentence were relevant to any contested issue of material fact in this trial. Johnson was not a witness against defendant. Even assuming Johnson had negotiated with the prosecution, no factual linkage was presented between Johnson's statements at the time of his arrest, his subsequent plea, and the case against defendant. Defense counsel's request was based on speculation, not on facts.

Moreover, defendant waived any error. Though he now asserts a violation of his Sixth Amendment right of confrontation, defendant failed to object on any constitutional grounds when the trial court refused to take judicial notice

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[5] Relevant evidence is "evidence, including evidence relevant to the credibility of a witness . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.)

that Johnson had pleaded guilty. (*People v. Hines* (1997) 15 Cal.4th 997, 1035.)

DISPOSITION

The judgment is affirmed.

RAYE, J.

We concur:

SIMS, Acting P.J.

DAVIS, J.